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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

C. F. CORNELIUS, PERSONAL REPRESENTATIVE,
ESTATE OF JOHN MCDONALD, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

At the date of John McDonald's death his only heir to his farmland was his wife, Gladys. She disclaimed her interest in that land with the result that her interest passed to three of her children. The estate elected the valuation provided by 26 U.S.C. Section 2032A (Special Use). Only Gladys consented on the timely filed estate tax return to the Special Use election; her children consented on an amended return filed after the nine month period of time permitted to file the original return. Other than the fact that the children did not consent on the original return the election of special use was valid. Under these facts, is the election proper for any of the following reasons:

A. The election by Gladys is all that is required by the regulations (Treas. Reg. Sec. 20.2032A-8(c)(1), or

B. The relief provided by Sec. 26 U.S.C. 2032A(d)(3) which permits a defective election to be cured, by adding additional signatures, or

C. Is relief provided by Sec. 1421, Tax Reform Act of 1988 which permits a defective election to be cured where the estate's representative supplies substantially all the information required on the tax return.

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On Petition for a Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

The taxpayer petitions for a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the Tax Court was entered on August 31, 1987 and is officially reported at 89 T.C. 293. The opinion of the Court of Appeals was entered on August 17, 1988 and is reported at 853 F.2d 1494, (8th Cir. 1988).

JURISDICTION

The decision of the Court of Appeals on August 17, 1988 was followed by a timely filed mote petition for rehearing on August 29, 1988. The petition for rehearing was denied by the Court of Appeals on September 15, 1988 and the mandate of the Court of Appeals was issued to the Tax Court on September 23, 1988. The time within which to appeal from the decision of the Eighth Circuit is ninety days; 28 U.S.C. §2101(c); Rule 20, Supreme Court Rules. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTES AND REGULATIONS INVOLVED

(a) IN GENERAL.—§2032A(d) (relating to election and agreement) is amended by adding at the end thereof the following new paragraph:

"(3) MODIFICATION OF ELECTION AND AGREEMENT TO BE PERMITTED.—The Secretary shall prescribe procedures which provide that in any case in which—

"(A) the executor makes an election under paragraph (1) within the time prescribed for filing such election, and

"(B) substantially complies with the regulations prescribed by the Secretary with respect to such election, but—

"(i) the notice of election, as filed, does not contain all required information, or

"(ii) signatures of 1 or more persons required to enter into the agreement described in paragraph (2) are not included on the agreement as filed, or the agreement does not contain all required information.

the executor will have a reasonable period of time (not exceeding 90 days) after notification of such failures to provide such information or agreements."

(a) IN GENERAL.—In the case of any decedent dying before January 1, 1986, if the executor—

(1) made an election under section 2032A of the Internal Revenue Code of 1954 on the return of tax imposed by §2001 of such Code within the time prescribed for filing such return (including extensions thereof), and

(2) provided substantially all the information with respect to such election required on such return of tax,

such election shall be a valid election for purposes of §2032A of such Code.

(b) EXECUTOR MUST PROVIDE INFORMATION.—An election described in subsection (a) shall not be valid if the Secretary of the Treasury or his delegate after the date of the enactment of this Act requests information from the executor with respect to such election and the executor does not provide such information within 90 days of receipt of such request.

Tax Reform Act of 1986, Pub. L. No. 99-514, §1421(a)-(b), 100 Stat. 2085, 2716 (1986) (1986 Amendment).

STATEMENT

John McDonald (hereafter "John") died testate on January 16, 1981 and was survived by his widow, Gladys McDonald ("Gladys"), four children and three grandchildren. (Stip. Par. 1) A federal estate tax return, form 706, was timely filed on October 7, 1981, to which was attached a copy of John's will together with all required documents including the agreement required by the regulations to elect to special value the farm real

estate under the provisions of §2032A, IRC. (Stip. Pars. 2 and 4, and Ex. 1-A)

On September 23, 1981, pursuant to the provisions of §30.1-10-01 and 47-11.1-01, NDCC (North Dakota Century Code), Gladys renounced "all her right, title and interest, devolving to her by testacy, intestacy, and as surviving joint tenant, or otherwise," to certain real property that would have otherwise passed to her as a result of the death of her husband. The effect of the disclaimer was that farm real estate passed to three of John's children under his will's residuary clause. (Stip., Pars. 5 and 6, Ex. 3-C)

On February 26, 1982, an amended federal estate tax return, form 706, was filed to reflect the changes resulting from the renunciation which included an agreement for special use valuation signed by the three children and others. (Stip., Par. 3 and Ex. 2-B)

The disclaimer-renunciation was written, unequivocal, irrevocable, and was delivered to the estate's reprsentative eight months after the death of John. (Ex. 3-C, Stip., Pars. 5 and 6) The Internal Revenue Service challenged the estate's election for special use, contending that it did not comply with the requirements of §2032A, IRC, in that the original timely filed return did not contain the signatures of all of the heirs succeeding to the interest in real property which was being specially valued. This position was upheld by the Tax Court (Judge Gerber), and affirmed by the Court of Appeals for the Eighth Circuit (Fagg, Wollman, Circuit Judges, and Re, Chief Judge, United States Court of International Trade, sitting by designation). The taxpayer filed a timely petition for rehearing which was denied on September 15, 1988.

Jurisdiction was based in the Tax Court of the United States upon the filing of a timely petition before the Tax Court on November 2, 1984, pursuant to §§6213 and 7442, IRC, 1954.

REASONS FOR GRANTING THE PETITION

Special use value is the special method of valuation introduced into the estate tax law in 1976. §2003(a) Tax Reform Act of 1976, Pub. L. 94-455, October 4, 1976. It effectively permits the valuation of qualifying farmland under a "capitalization of rents method" rather than the traditional "fair market value" method of valuing property for purposes of the federal estate tax. §2031(a), IRC. This method of valuation is elective with the taxpayer. §2032A(a)(1)(B).

If the estate qualifies (as John's estate undisbutably did) the real property may be valued by the following formula:

$$\frac{\text{Average cash rent for comparable land (5 years)} - \text{average real estate (5 years)}}{\text{average Federal Land Bank interest rate (5 years)}}$$

For example, if the average cash rent for comparable land were $72 per acre for the five years prior to death, and the average real estate taxes for the same period of time was $2 per acre, and the average Federal Land Bank interest rate for that same five year period of time is 10%, the land would be valued at $700 per acre. The full fair market value of the land is unimportant, except that the total reduction in the gross estate could not then exceed $500,000 (now $750,000). §2032A(a)(2), IRC.

To insure that this benefit is available only for so-called "family farms" the statutory scheme provides for the recapture of the tax savings in the event that the property is disposed of or no longer utilized for a qualified use at any time within a fifteen year period following death (ten years for decedents dying after 198 1981). §2032A(c), IRC. Each heir receiving real property

specially valued must consent to be personally liable for the additional estate tax which is imposed upon cessation of the qualified use. §2032A(d))2), IRC. In addition the Internal Revenue Service is entitled to a lien pursuant to §6324B, IRC, which imposes a lien for the amount of the recapture tax.

The regulation (Treas. Reg. §2032A-8(c) (App., p. A-1) provides that all persons who have an interest in the property which as of the date of the decedent's death can be asserted under applicable local law must sign the agreement to special valuation. John's will left all his property to his wife Gladys. (Stip., Ex. 1-A) An examination of the regulation cited above discloses that it is a procedural list of the requirements necessary for the filing of the appropriate election documents which must be attached to the federal estate tax return. This document was filed but the only person signing the document was Gladys, who was, in terms of the reality of the physical world, John's only heir at the date of his death.

Because Gladys disclaimed on September 23, 1981 the real property passed through John's residuary clause to three of his children. Under North Dakota law (§30.1-10-01(3), NDCC and 47-11.1-03, NDCC) the effect of the disclaimer was to treat Gladys as though she had predeceased John so that under the doctrine of "relation back" the three children were deemed to have an interest in the real property as of the date of John's death. The taxpayers urged before the Tax Court and the Court of Appeals that the doctrine of "relation back" had no application to a procedural regulation where Gladys was John's only actual heir at the moment of death. Clearly the attorney who prepared the estate tax return was simply attempting to follow the regulation to its letter, and did not appreciate the legal fiction of the relation back doctrine in the case of renunciations or disclaimers.

Both the Tax Court and the Court of Appeals held that despite the lack of any reference to disclaimers in the regulations

in 1981 (or for that matter in 1988) with respect to a §2032A election the three children did possess an interest in the property as of the date of the decedent's death so as to require that their signatures be appended to the agreement for special use.

Congress has twice attempted to provide relief to estates that failed to comply with the technical requirements of §2032A. The first, §2032A(d)(3), IRC, was added in 1984 and is reproduced on page 2 of this petition.

This change in the law was explained by a sponsor, Senator Dickson of Indiana, as follows:

> "Mr. President, this is a very simple and straightforward amendment. It attempts to deal with a policy of at least certain agents of the Internal Revenue Service, that has the affect of undermining the actions Congress has taken to try to preserve family farms and other small family businesses.***
>
> There seems to be people at the IRS, however, who are not interested in preserving family farms and small businesses, and want to use the slightest technicality to prevent an estate from being valued under the provisions of §2032A.***"
>
> Congressional Record, Senate, April 11, 1984, pp. 4318, 4319.

This petition for certiorari has much to do with the utilization of Committee Reports by the courts below to explain the meaning of these two relief provisions. With unusual clarity for a tax statute the first relief provision permits the curing of a defective election if:

> "1. It (the return) substantially complies with the regulations prescribed by the secretary with respect to such election, but***

(ii. signatures of one or more persons required to enter into the agreement described in para-graph (2) are not included in the agreement as filed or the agreement does not contain all required information)***"

Nevertheless the Court of Appeals determined that it was necessary to examine the legislative history to determine what was meant by the phrase "substantially complies" despite the fact that there was no challenge to the special use election other than the failure of John and Gladys' three children to execute the agreement. Based upon their examination of the legislative history the Court of Appeals decided that to "substantially comply" it was necessary that the signatures of the children be on the agreement and that the legislation (§2032A(d)(3)) provided no relief for the estate.

One of the pressing matters presented by this case is the need for guidance in today's federal court system with the utilization of legislative history. Our view of the mis-use of legislative history was addressed by the Court of Claims in *Hart v. United States,* 585 F.2d 1025 (Ct. Cl. 1978) which called attention to the commonly perceived belief, today, that Committee Reports and the like are perhaps less trustworthy sources of Congressional intent than they used to be. (p. 1033) There the Court refused to utilize legislative history which was contrary to the express language of the statute, stating: (p. 1035)

"***Congress may be presumed not unskilled in the use of words and highly likely to have enacted what it intended***"

People are entitled to find in the statute books the laws that govern them."

See also *Piper v. Chris-Craft Industries, Inc.,* 430 U.S. 126 (1977).

It is perceived by many practitioners, including the writer, that what the Internal Revenue Service loses in Congress is often

restored by the staff when it aids in the writing of legislative history. Addressing that problem is a significant reason why this case is an important one and should be reviewed by this Court.

In 1986 it was apparent that the Internal Revenue Service was still applying overly technical reasons to deny special use elections. Congress again provided relief through the enactment of §1421, Tax Reform Act of 1986, reproduced at page 3 of this petition.

That statute essentially simplified the curative process by permitting the executor to provide any information which was not provided at the time of the filing of the return so long as the executor provided "substantially all of the information" with respect to the election on that return.

Once again the Court of Appeals, relying upon legislative history, determined in this case that the purpose of the 1986 amendment was merely to deal with faulty instructions on the federal estate tax return. Some support for that proposition may be gleaned from the Conference Report (H.R. Conf. Rep. No. 841, 99th cong., 2d Sess. II-770-771, reprinted in 1986 U.S. Code Cong. and Admin. News 4075, 4858-59). However we must once again remember that the broadly drawn statute makes no mention of the instructions to the federal estate tax return. Clearly and in relatively simple language it provides relief which would enable this estate to qualify under §2032A, IRC.

The effects of §2032A(d)(3), IRC and §1421, Tax Reform Act of 1986, are in the process of being extensively litigated. This is the first case to be decided by an appellate court. Currently pending before the Court of Appeals for the Seventh Circuit is *Lucille Prussner, as Executrix of the Estate of Aileen Pfeifer v. United States,* not officially reported, 87-2 U.S.T.C. par. 13739 (M.D. Ill. 1987), which was argued on November 30, 1988.

Also pending before the Eighth Circuit is *Donna R. Foss, Personal Representative of the Estate of Gustave J. Foss v. United States,* No. 88-5152 MN, not officially reported, 88-1 U.S.T.C. Par. 13,762 (1988) Both *Prussner* and *Foss* were lower court decisions in favor of the taxpayer on facts which are not distinguishable from those of this case.

Accordingly the reasons for granting the writ of certiorari, pursuant to Rule 17, Supreme Court Rules, are that this case is a proper vehicle for this Court to determine the important federal question of the method and standard that should apply when a court is required to resort to legislative history in tax cases, and to settle an important issue in the administration of the estate tax law with respect to the meaningful effect of two relief statutes, §2032A(d)(3) and §1421, Tax Reform Act of 1986.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Treas. Reg. §20.2032A-8(c) provides:

(c) **agreement to special valuation by person with an interest in property — (1) In general.** The agreement required under §2032A(a)(1)(B) and (d)(2) must be executed by all parties who have any interest in the property being valued based on its qualified use as of the date of the decedent's death. In the case of a qualified heir, the agreement must express consent to a personal liability under §3023A(c) in the event of certain early dispositions of the property or early cesstion of the qualified use. See §2032A(c)(6). In the case of parties (other than qualified heirs) with interests in the property, the agreement must express consent to collection of any additional estate tax imposed under §2032A(c) from the qualified property. The agreement is to be in a form that is binding on all parties having an interest in the property. It must designate an agent with satisfactory evidence of authority to act for the parties to the agreement in all dealings with the Internal Revenue Service on matter arising under §2032A and must indicate the address of that agent.

(2) Persons having an interest in designated property. An interest in property is an interest which, as of the date of decedent's death, can be asserted under applicable local law so as to affect the disposition of the specifically valued property by the estate. Any person in being at the death of the decedent who has any such interest in the property, whether present or future or vested or contingent, must enter into the agreement. Included among such persons are owners of remainder and executory interests, the holders of general or special powers of appointment, beneficiaries of a gift over in default of exercise of any such power, covenants, joint tenants and holder of other undivided interests when the decedents held only a joint or undivided interest in specially valued property or only an undivided interest is specially valued, and trustees or trusts holding any

interest in the property. An heir who has the power under local law to caveat (challenge) a will and thereby affect disposition of the property is not, however, considered to be a person with an interest in property under §2032A solely by reason of that right. Likewise, creditors of an estate are not such persons solely by reason of their status as creditors.

APPENDIX B

Gladys L. McDONALD, Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE, Appellee.

ESTATE OF John McDONALD, Deceased,
C.F. Cornelius, Personal Representative, Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE, Appellee.

United States Court of Appeals,
Eighth Circuit.

Submitted May 11, 1988.

Decided Aug. 17, 1988.

Rehearing Denied Sept. 15, 1988.

Estate appealed from order of the United States Tax Court upholding determination that certain estate property did not qualify for special use valuation, and decedent's widow appealed from order upholding determination that her disclaimer of survivorship interest in jointly held property was taxable transfer, 89 T.C. 293. The Court of Appeals, Wollman, Circuit Judge, held that: (1) estate's notice of election of special use valuation for decedent's farmland did not substantially comply with requirements for such notice, and could not be corrected in amended return, and (2) time period in which decedent's widow could disclaim her interest in farmland held jointly with decedent and avoid gift tax consequences commenced to run at decedent's death, rather than when joint tenancy was created.

Affirmed in part, reversed in part, and remanded.

1. Internal Revenue (Key) 4184.10

Estate's election for special use valuation for decedent's farmland was required to contain names and signatures of dece-

dent's children, where decedent's widow had disclaimed her interest in decedent's farmland, making children only persons with any interest in the land under North Dakota's relation-back doctrine. NDCC 30.1-10-01, 47-11.1-01; 26 U.S.C.A. § 2032A.

2. Internal Revenue (Key) 4184.10

Estate's notice of election of special use valuation for decendent's farmland which did not contain signatures of decedent's children who had interest in farmland, did not substantially comply with requirements for such notice, and could not be corrected by adding children's signature in amended return. 26 U.S.C.A. §§ 1 et seq., 2032A(d)(3), (d)(3)(B)(i, ii); Tax Reform Act of 1986, § 1421(a, b), 100 Stat. 2085.

3. Internal Revenue (Key) 4205.10

Time period in which decendent's widow could disclaim her interest in farmland held jointly with decedent and avoid gift tax consequences commenced to run at decedent's death, rather than when joint tenancy was created. 26 U.S.C.A. §§ 2501(a)(1), 2511(a), 2518.

Garry A. Pearson, Grand Forks, N.D., for appellant.

Teresa E. McLaughlin, Washington, D.C., for appellee.

Before FAGG and WOLLMAN, Circuit Judges, and RE*, Chief Judge.

WOLLMAN, Circuit Judge.

The Estate of John McDonald (Estate) appeals from a tax court order upholding the Commissioner's determination that

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* The HONORABLE EDWARD D. RE, Chief Judge, United States Court of International Trade, sitting by designation.

certain estate property did not qualify for special use valuation under section 2032A of the Internal Revenue Code.[1] In a consolidated appeal, Gladys L. McDonald (Gladys) appeals from a tax court order upholding a determination by the Commissioner that her disclaimer of the survivorship interest in jointly-held property was a taxable transfer because such disclaimer was not made within the time period prescribed by 26 C.F.R. § 25.2511-1(c). *McDonald v. Comm'r,* 89 T.C. 293 (1987). We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I.

John McDonald (Decedent), a resident of North Dakota, died testate on January 16, 1981, survived by his widow, Gladys, four children and three grandchildren. Except for some small specific bequests, the will provided that Gladys was to inherit all of Decedent's property. In addition, Decedent and Gladys had owned certain property, including several parcels of farmland, as joint tenants with right of survivorship.

On September 23, 1981, Gladys disclaimed her interest in the farmland she stood to inherit under the terms of Decedent's will, as well as the survivorship interest in most of the farmland the couple had owned in joint tenancy. As a result of the disclaimer, this property passed to three of Decedent's children, Virlyn McDonald, Dorothy Spicer, and Gladys Jean Cox, in equal shares.

The federal estate tax return for Decedent's estate was timely filed with the Internal Revenue Service on October 7, 1981. Included in this return was a "Notice Of Election Of Special Use Valuation As Authorized By Section 2032A" and an "Agree-

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[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954 and related regulations or to relevant state statutes as amended and in effect at the date of death.

ment Relating To Special Use Valuation Under Section 2032A Of The 1976 Tax Reform Act." Both were signed by Gladys and C.F. Cornelius, the personal representative of the Estate, and listed Gladys as the only person with an interest in the farmland on which special use valuation was elected.

On February 26, 1982, an amended federal estate tax return was filed for Decedent's estate. This return contained an amended "Agreement Relating To Special Use Valuation Under Section 2032A Of The 1976 Tax Reform Act," signed by Virlyn McDonald, Dorothy Spicer, Gladys Jean Cox, and three of Decedent's grandchildren.

Based on the stipulated facts, the tax court upheld the Commissioner's refusal to permit special use valuation of the farmland, holding that by omitting the children's names and signatures on the original notice of election and agreement, the Estate had not complied with the election requirements under 26 C.F.R. § 20.2032A-8. The tax court also upheld the Commissioner's determination that Glady's disclaimer of the survivorship interest was a taxable gift, holding that she had not made the disclaimer within the time period prescribed by 26 C.F.R. § 25.2511-1(c). The parties having stipulated to the facts below, we review the tax court's application of the law to the facts de novo. *Mangels v. United States,* 828 F.2d 1324, 1326 (8th Cir. 1987).

II.

[1] An election for a special use valuation is made by attaching a notice of election and a recapture agreement to a timely filed federal estate tax return. 26 U.S.C. § 2032A(d)(1);[2] 26

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[2] In 1981, section 2031A(d)(1) was amended to allow the election to be made on the first estate tax return, whether or not timely filed. This amendment is inapplicable in the present case, however, because it only applies to the estates of decedents dying after December 31, 1981.

C.F.R. § 20.2032A-8(a)(3).[3] The notice of election must contain fourteen specific items, including "(xii) The name, address, taxpayer identification number, and relationship to the decedent of each person taking an interest in each item of specially valued property * * *." 26 C.F.R. § 20.2032A-8(a)(3). An interest in the property is one "which, as of the date of decedent's death, can be asserted under applicable local law so as to affect the disposition of the specially valued property of the estate." 26 C.F.R. § 20.2032A-8(c)(2).

If the property subject to special use valuation is disposed of or otherwise ceases to be qualified use property within fifteen years after a decedent's death, an additional estate tax, referred to as recapture tax, is imposed, for which the qualified heir is personally liable. 26 U.S.C. § 2032A(c). To ensure payment, all parties with an interest in the property must expressly consent to personal liability for the recapture tax in a binding agreement attached to a timely file estate tax return. 26 C.F.R. § 2032A-8(c)(1).[4]

---

[3] This regulation was drafted pursuant to express statutory authority. 26 U.S.C. § 2032A(d)(1). The Estate does not argue that this regulation is unreasonable or plainly inconsistent with the statute. Accordingly, this regulation must be upheld. *See Comm'r v. Portland Cement Co.*, 450 U.S. 156, 169, 101 S.Ct. 1037, 1045, 67 L.Ed.2d 140 (1981).

[4] 26 C.F.R. § 2032A-8(c)(1) states in relevant part:

> *(c) Agreement to special valuation by persons with an interest in property—(1) In general.* The agreement * * * must be executed by all parties who have any interest in the property being valued based on its qualified use as of the date of decedent's death. In the case of a qualified heir, the agreement must express consent to personal liability under section 2032A(c) in the event of ceratin early dispositions of the property or early cessation of the qualified use. * * * The agreement is to be in a form that is binding on all parties having an interest in the property.

The parties have stipulated that Gladys effectively disclaimed her interest in the property for which the special use valuation is sought pursuant to N.D.Cent.Code §§ 30.1-10-01 and 47-11.1-01. Moreover, the Estate agrees that under North Dakota statute disclaimers relate back to the date of the Decedent's death and that the disclaimed property devolves as though the disclaiming party had predeceased the Decedent. Thus, as of the date of Decedent's death, those taking an interest in the disclaimed property were Virlyn McDonald, Dorothy Spicer, and Gladys Jean Cox.

The Estate argues that the relation-back doctrine is a legal fiction that should be ignored for the purpose of this election. We disagree. Those taking an interest in specially valued property are those whose interests can be asserted under applicable local law to affect an estate's disposition of such property. 26 C.F.R. § 20.2032A-8(c)(2). By virtue of the disclaimer, Gladys had no such interest under North Dakota laws. Accordingly, we conclude that the notice of election and recapture agreement filed with the original estate tax return did not satisfy the requirements of 26 C.F.R. § 20.2032A-8.

In 1984, section 2032A was amended as follows to permit correction of certain imperfections in special use elections and recapture agreements:

> (a) IN GENERAL.—Section 2032A(d) (relating to election and agreement) is amended by adding at the end thereof the following new paragraph:
>
> "(3) MODIFICATION OF ELECTION AND AGREEMENT TO BE PERMITTED.—The Secretary shall prescribe procedures which provide that in any case in which—
>
> > "(A) the executor makes an election under paragraph (1) within the time prescribed for filing such election, and

> "(B) substantially complies with the regulations prescibed by the Secretary with respect to such election, but—
>
> "(i) the notice of election, as filed, does not contain all required information, or
>
> "(ii) signatures of 1 or more persons required to enter into the agreement described in paragraph (2) are not included on the agreement as filed, or the agreement does not contain all required information,
>
> the executor will have a reasonable period of time (not exceeding 90 days) after notification of such failures to provide such information or agreements."

Deficit Reduction Act of 1984, Pub.L. No. 98-369, § 1025(a), 98 Stat. 494, 1030-31 (1984) (codified as amended at 26 U.S.C. § 2032A(d)(3)) (1984 Amendment).

[2] The Estate argues that even if the notice of election and recapture agreement filed with the original estate tax return did not comply with the literal requirements of 26 C.F.R. § 20.2032A-8, they nonetheless substantially complied with those requirements pursuant to the 1984 Amendment. Specifically, the Estate argues that its amended return corrects the agreement as permitted by 26 U.S.C. § 2032A(d)(3)(B)(ii) by adding "signatures of 1 or more persons required to enter into the agreement." We disagree.

Before a recapture agreement may be corrected by the addition of signatures, the agreement as filed with the original return must substantially comply with 26 C.F.R. § 20.2032A-8. As discussed above, this regulation specifically requires the agreement to "be in a form that is binding on all parties having an interest in the property." 26 C.F.R. § 20.2032A-8(c)(1). The Estate does not argue that the original recapture agreement was binding on Decedent's children under North Dakota law. Thus, the issue is whether a recapture agreement that was not executed

by any of the parties with an interest in the property can substantially comply with the requirements of 26 C.F.R. § 20.2032A-8.

Neither party has cited a case addressing this specific issue. In construing a case of first impression, we look first to the language of the statute itself; second, to its legislative history; and third, to the interpretation given to it by its administering agency. *Brock v. Writers Guild of America, West, Inc.*, 762 F.2d 1349, 1353 (9th Cir. 1985). Having done so, we conclude that the recapture agreement filed with the original return did not substantially comply with 26 C.F.R. § 20.2032A-8.[5]

The statutory language, as a precondition to the addition of signatures, requires that the original election substantially comply with 26 C.F.R. § 20.2032A-8, which includes the requirement that the original agreement be binding on all parties taking an interest in the property. Based only on this language, it is difficult to conclude that the original election was in substantial compliance with this requirement when it contained neither the name nor the signature of anyone with an interest in the property as of the date of Decedent's death. *See Tipps v. Comm'r*, 74 T.C. 458 (1980) (for an election to be valid, there must be certainty as to what was elected and an unequivocal agreement to be bound by the applicable provisions).

Second, the legislative history of the 1984 Amendment states as follows:

> [A]n agreement to the current use valuation election may be perfected under this provision provided the agreement, as filed with the estate tax return, evidences substantial

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[5] Because this case is on appeal from the Commissioner's determination that the Estate had not substantially complied with the requirements of 26 C.F.R. § 20.2032A-8, it is unnecessary to separately address the third vehicle of statutory construction.

> compliance with the requirements of the regulations. To be eligible for perfection, the agreement as originally filed must at a minimum be valid under State law and must include the signatures of all parties having a present interest or a remainder interest other than an interest having a relatively small value. The right to perfect agreements is intended to be limited to cases where, for example, a parent of a minor remainderman, rather than a *guardian ad litem* as required under State law, signs the agreement.

H.R.Conf.Rep. No. 861, 98th Cong., 2d Sess. 1241, *reprinted in* 1984 U.S.Code Cong. & Admin.News 1445, 1929 (footnote omitted). Clearly, the agreement as filed with the original return does not contain the signatures required by the legislative history.

The Estate urges us to disregard the legislative history of the 1984 Amendment. Primarily, it argues that there is no need to resort to legislative history when the plain language of the statute permits the addition of "signatures of 1 or more persons required to enter into the agreement." This argument is misdirected, however, because the interpretation problem in this case concerns the term "substantial compliance," the meaning of which is not clear from the face of the statute.

In enacting the special use provisions in 1976, Congress intended " 'to encourage the continuation of family farms after the death of the farm's owner' " *Mangels,* 828 F.2d at 1326 (quoting *Martin v. Commissioner,* 783 F.2d 81, 82 (7th Cir. 1986)). The 1984 Amendment furthers this policy by preventing Internal Revenue Service representatives from using slight technical failures in a notice of election or recapture agreement to prevent otherwise qualified taxpayes from taking advantage of the special use provisions. 130 Cong.Rec. S4318-19 (daily ed. April 11, 1984) (statement of Sen. Dixon, amendment sponsor). Based on our review of the legislative history, however, we conclude that the omission from the recapture agreement of the

signatures of all persons with an interest in the property is not the type of slight technicality envisioned by Congress when the 1984 amendment was enacted.[6]

The Tax Reform Act of 1986 also contained a provision permitting correction of certain failures in special use elections and recapture agreements. That provision states in relevant part:

> (a) IN GENERAL.—In the case of any decedent dying before January 1, 1986, if the executor—
>
> > (1) made an election under section 2032A of the Internal Revenue Code of 1954 on the return of tax imposed by section 2001 of such Code within the time prescribed for filing such return (including extensions thereof), and
> >
> > (2) provided substantially all the information with respect to such election required on such return of tax,
>
> such election shall be a valid election for purposes of section 2032A of such Code.
>
> (b) EXECUTOR MUST PROVIDE INFORMATION. —An election described in subsection (a) shall not be valid if the Secretary of the Treasury or his delegate after the date of the enactment of this Act requests information

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[6] The fact that Congress intended the 1984 Amendment to permit the correction of only slight technical failures is further supported by the illustrations in the legislative history of information items that may be added to a notice of election under 26 U.S.C. § 2031A(d)(3)(B)(i): social security numbers and addresses of qualified heirs; copies of appraisals, but not if such appraisals were obtained after the estate tax return was made; and legal descriptions of the property, provided the descriptions initially filed with the return described the property with reasonable clarity. H.R.Conf.Rep. No. 861, 98th Cong., 2d Sess. 1241 *reprinted in* 1984 U.S.Code Cong. & Admin.News 1445, 1929.

> from the executor with respect to such election and the executor does not provide such information within 90 days of receipt of such request.

Tax Reform Act of 1986, Pub.L. No. 99-514, § 1421(a)-(b), 100 Stat. 2085, 2716 (1986) (1986 Amendment).

The essential difference between the 1986 Amendment and the 1984 Amendment is that substantial compliance here is with reference to the instructions to the federal estate tax return, rather than with the Treasury regulation. H.R.Conf.Rep. No. 841, 99th Cong., 2d Sess. II-770-771, *reprinted in* 1986 U.S.Code Cong. & Admin.News 4075, 4858-59. The Estate has not argued that the instruction followed in preparation of its return varied from the regulation requirements. Accordingly, we conclude that the 1986 Amendment provides the Estate no more relief than did the 1984 Amendment.[7]

III.

[3] Federal gift tax is imposed "on the transfer of property by gift." 26 U.S.C. § 2501(a)(1). The scope of this tax is broad, applying "whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible." 26 U.S.C. § 2511(a). Moreover, in construing the gift tax provisions, " '[t]he terms "property," "transfer," "gift," and "indirectly" are used in the broadest and most comprehensive sense; the term "property" reaching every species of right or interest protected by law and

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[7] Both the notice of election and the recapture agreement must substantially comply with the Treasury regulations. H.R.Cong.Rep. No. 861, 98th Cong., 2d Sess. 1241, *reprinted in* 1984 U.S.Code Cong. & Admin.News 1445, 1929. Because we have determined that the recapture agreement as filed with Decedent's original estate tax return did not substantially comply with the 26 C.F.R. § 20.2032A-8, it is unnecessary for us to address the sufficiency of the notice of election.

having an exchangable value.' " *Jewett v. Comm'r,* 455 U.S. 305, 309, 102 S.Ct. 1082, 1086, 71 L.Ed.2d 170 (1982) (quoting S.R. No. 665, 72nd Cong., 1st Sess. 39 (1932); H.R. No. 708, 72nd Cong., 1st Sess. 27 (1932)). Thus, absent an applicable exception, a disclaimer, which is an indirect transfer, would fall within the encompassing language of the gift tax statute.

Such an exception exists, however, for certain disclaimers made within a specified period after the disclaimed property is transferred to the disclaimant. 26 U.S.C. § 2518 (applicable for transfers creating an interest in the disclaimant after December 31, 1976);[8] 26 C.F.R. § 25.2511-1(c)(2) (applicable for transfers

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[8] Section 2518 states in relevant part:

(a) General rule.—For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.

(b) Qualified disclaimer defined.—For purposes of subsection (a), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if—

(1) such refusal is in writing,

(2) such writing is received by the tranferor [sic] of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of—

(A) the day on which the transfer creating the interest in such person is made, or

(B) the day on which such person attains age 21,

(3) such person has not accepted the interest of any of its benefits, and

(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either—

(A) to the spouse of the decedent, or

(B) to a person other than the person making the disclaimer.

creating an interest in the disclaimant before January 1, 1977).[9] The effect of these disclaimer provisions is to collapse the entire transaction into a single transfer from the original owner to the ultimate recipient, *Kennedy v. Comm'r,* 804 F.2d 1332, 1334 (7th Cir. 1986), thereby ignoring the gift tax consequences of the intermediate disclaimer.

Gladys disclaimed the survivorship interest in the property she had formerly held with decedent as joint tenants on September 23, 1981, less than nine months following decedent's death. The question before us is whether the transfer relative to which the timeliness of the disclaimer is measured refers to the transfer creating the joint tenancy or the transfer of the survivorship interest at the joint tenant's death.

The tax court, relying primarily on *Jewett v. Comm'r,* 455 U.S. 305, 102 S.Ct. 1082, 71 L.Ed.2d 170 (1982, adopted the Commissioner's position that "transfer" as used in the disclaimer provisions refers to the transfer creating the joint tenancy. Because the joint tenancies in question were created prior to 1977, the court concluded that Gladys' September 23, 1981, disclaimer was not "made within a reasonable time" as required by 26 C.F.R. §25.2511-1(c)(2).

In *Jewett,* Jewett's grandmother established a testamentary trust providing that the trust income should be paid to Jewett's grandfather for life, and thereafter to Jewett's parents. Upon the death of the surviving parent, the trust principal was to be

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[9] 26 C.F.R. § 25.1511-1(c)(2) provides in relevant part:

> [W]here the law governing the administration of the decedent's estate give a beneficiary, heir, or next-of-kin a right completely and unqualifiedly to refuse to accept ownership of property transferred from a decedent * * *, a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be uneqivocal and effective under the local law. There can be no refusal of ownership of property after its acceptance.

divided " 'into equal shares * * * so that there shall be one share for each child of my said son [petitioner's father] then living and one share for the issue then living representing each child of my said son then dead.' " 455 U.S. at 306, 102 S.Ct. at 1084 (quoting trust instrument). While Jewett's mother was still living, and therefore before his interest vested, Jewett disclaimed his interest in the trust. At the time, Jewett was forty-five years old, and the trust had been in existence for thirty-three years. The Supreme Court held that the transfer referred to in 26 C.F.R. § 25.2511-1(c) occurred when the contingent interest was created and not when it vested, and that a disclaimer made thirty-three years after the transfer was not made "within a reasonable time" under 26 U.S.C. §2501(a)(1) and 2511(a). *Id.* at 312, 318-19, 102 S.Ct. at 1091.

Gladys, on the other hand, urges this court to adopt the Seventh Circuit's position in *Kennedy v. Comm'r,* 804 F.2d 1332 (7th Cir.1986). Kennedy had received a gift of a joint tenancy in 1953 when she and her husband acquired the farm. Her husband died in 1978, and in 1979 she disclaimed the survivorship interest under Illinois law. The Seventh Circuit concluded that the relevant transfer occurred when Kennedy acquired the survivorship interest on her husband's death in 1978, making 26 U.S.C. §2518 the applicable disclaimer provision.

Kennedy distinguished *Jewett* on the basis of the power of partition that is associated with joint tenancy. *Kennedy* found the deceased joint tenant's power of partition to be equivalent to a general power of appointment over the survivorship interest, because by partitioning the property a joint tenant could direct his half to his creditors and legatees of is choice.[10] *Kennedy,* 804 F.2d at 1335. Under the gift tax regulations, "[a] per-

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[10] In the gift tax context, a general power of appointment generally means "any power of appointment exercisable in favor of the person possessing the power * * *, his estate, his creditors, or the creditors of his estate." 26 C.F.R. §25.2514-1(c)(1).

son to whom any interest in property passes by reason of the * * * lapse of a general power [of appointment] may disclaim such interest within a 9-month period after the * * * lapse." 26 C.F.R. §25.2518-2(c)(3). applying this concept to the transfer of the survivorship interest, *Kennedy* concluded that the surviving joint tenant should have nine months after the lapse of the decedent's power of partition in which to disclaim a survivorship interest.

The Commissioner contends that the tax court correctly concluded that the deceased joint tenant's right to partition or sever is merely another contingency and does not distinguish *Kennedy* from *Jewett*. The commissioner notes that under North Dakota law, "[a] joint tenancy may be described as a life estate with each joint tenant having a contingent remainder in fee—the contingency being based upon survival of the other joint tenant." *Jamestown Terminal Elevator, Inc. v. Knopp,* 246 N.W.2d 612, 613 (N.D.1976). In this respect, the Commissioner oversimplifies the nature of the deceased joint tenant's interest. In *Jamestown,* the North Dakota Supreme Court further clarified the nature of this interest: "The deceased joint tenant had, essentially, a life estate which no longer exists, a power in himself and his judgment creditor to sever which was never exercised and lapsed upon death, and a contingent remainder which never vested." 246 N.W.2d at 614. This power to sever, which the Seventh Circuit analogized to a general power of appointment over the survivorship interest, distinguishes the right to partition or sever from the survival contengency addressed in *Jewett.*[11]

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[11] The tax court also attempted to distinguish *Jewett* on the basis that North Dakota law permits severance of a joint tenancy only in limited circumstances. This is an incorrect statement of North Dakota law. A joint tenancy can be severed in many ways, such as by voluntary agreement between the parties, *Renz v. Renz,* 256 N.W.2d 883, 886 (N.D.1977), by an action for partition under N.D.Cent.Code §32-16-01, or by the conveyance by one co-tenant of his interest in joint tenancy property. *Robar v. Ellingson,* 301 N.W.2d 653, 662 (N.D.1981).

Accordingly, we conclude that the relevant transfer for the purpose of the disclaimer provisions occurs at the death of the joint tenant and not at the creation of the joint tenancy. Thus, the time period in which Gladys could disclaim the survivorship interest began to run in 1981 and therefore is governed by the provisions of 26 U.S.C. §2518. Although there is no question that Gladys' disclaimer was timely under this statute, the parties disagree as to whether the disclaimer otherwise qualified under 26 U.S.C. §2518. Accordingly, we remand the case to the tax court for the purpose of that determination. *Kennedy,* 804 F.2d at 1336 (the tax court should have the initial opportunity to apply the terms of 26 U.S.C. §2518 and its implementing regulations).

In summary, the Tax Court's order upholding the Commissioner's determination that the farmland did not qualify for special use valuation under 26 U.S.C. § 2032A is affirmed. Regarding the gift tax issue, the Tax Court's order is reversed, and the case is remanded for further proceedings consistent with this opinion.

APPENDIX C

GLADYS L. McDONALD, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

ESTATE OF JOHN McDONALD, DECEASED, C.F. CORNELIUS, PERSONAL REPRESENTATIVE, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 37673-84, 37694-84.[1] Filed August 18, 1987.

Petitioner Gladys L. McDonald (P) and decedent held real property in joint tenancies which were created before 1976. On Sept. 23, 1981, within 9 months after decedent's death, P executed a disclaimer of decedent's one-half interest in the real property. *Held,* the transfers of the property interests occurred upon the creation of the joint tenancies. *Held, further,* the disclaimer was not made within a reasonable time as required by §25.2511-1(c), Gift Tax Regs., and thus constituted a taxable transfer under §2511, I.R.C. 1954. *Kennedy v. Commissioner,* 804 F.2d 1332 (7th Cir. 1986), revg. a Memorandum Opinion of this Court, not followed.

The Estate of John McDonald attempted to elect §2032A, I.R.C. 1954, special use valuation. On Oct. 7, 1981, an original estate tax return and recapture agreement was filed, including only the signatures of P and the personal representative of the estate. On Feb. 26, 1982, an amended estate tax return was filed which included the signatures of three persons whose interests in the property resulted from P's Sept. 23, 1981, disclaimer. *Held,*

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[1] These cases were consolidated for purposes of briefing and opinion.

because of the omission from the original estate tax return of three necessary signatures, the attempted §2032A, I.R.C. 1954, election fails. *Held, further,* the amended estate tax return does not cure the insufficiency of the original estate tax return.

Garry A. Pearson, for the petitioners.
Gail K. Gibson, for the respondent.

OPINION

GERBER, *Judge:* Respondent determined a $90,163.37 Federal gift tax deficiency regarding Gladys L. McDonald for the taxable quarter ended September 30, 1981, and a $152,013.67 estate tax deficiency for the Estate of John McDonald. These cases were submitted fully stipulated pursuant to Rule 122.[2] The stipulated facts and attached exhibits are incorporated herein by this reference.

The two issues presented for our consideration are (1) whether a disclaimer is a qualified disclaimer under section 2518 or a disclaimer executed within a reasonable time under section 2511,[3] and (2) whether the Estate of John McDonald is entitled to §2032A special use valuation.

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[2] All Rule references are to the Tax Court Rules of Practice and Procedure, and unless otherwise indicted, all section references are to the Internal Revenue Code of 1954 as amended and in effect at all relevant times.

[3] §2518 is applicable only to "transfers creating an interest in the person disclaiming made after December 31, 1976." §2009(e)(2), Pub. L. 94-455, 90 Stat. 1896. §2511 and the regulations thereunder apply otherwise. Which section applies herein depends upon our resolution of the issue of when the transfer creating the interest occurred.

John McDonald (decedent), a resident of Grand Forks, North Dakota, died testate on January 16, 1981. He was survived by Gladys L. McDonald (his widow and one of the petitioners[4] herein), four children, and three grandchildren. At the time the petitions in these cases were filed, petitioner Gladys L. McDonald resided in Arvilla, North Dakota, and C.F. Cornelius, the personal representative of the decedent's estate, resided in Larimore, North Dakota.

On September 23, 1981, petitioner signed a renunciation (sometimes referred to as disclaimer) of "all her right, title, and interests, devolving to her by testacy, intestacy, as surviving joint tenant, or otherwise to all property described on the attached Schedule A."[5] Copies of the disclaimer were delivered to C.F. Cornelius (Cornelius), the personal representative of decedent's estate, and to three of the four surviving children.[6] Petitioner and the decedent acquired title to each of the joint tenancy properties listed in the disclaimer from unrelated third parties, with the exception of parcels "4" and "6," which were first acquired by petitioner in her own name, and then conveyed to petitioner and decedent as joint tenants with right of sur-

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[4] For convenience, we refer to Gladys L. McDonald as petitioner and to the Estate of John McDonald (the other petitioner) as "estate."

[5] The renunciation disclaimed the decedent's interest in the real property held in joint tenancy.

[6] The surviving child who did not receive a copy of the renunciation, Viola McDonald, at that time was mentally impaired and required full-time skilled care. All other surviving children were present at the signing of the renunciation.

vivorship.[7] A Federal estate tax return was timely filed on October 7, 1981, at the Grand Forks Office of the Internal Revenue Service. Decedent's last will and testament was attached to the return. Also included in the return was an election for §2032A special use valuation and an agreement to be responsible for additional estate tax (recapture agreement) if the qualified use was terminated prematurely. Both statements were signed by petitioner and Cornelius.

An amended Federal estate tax return was filed with the Internal Revenue Service at Ogden, Utah, on February 26, 1982. Included in the amended return was an agreement for §2032A special use valuation signed by three of decedent's children (Virlyn McDonald, Gladys Jean Cox, and Dorothy Spicer), and two grandchildren (Kathy McDonald and Lori McDonald). Under the terms of decedent's last will and testament, the three children inherited the property in question in the event petitioner did not survive decedent.

The Disclaimer

These issues arise under circumstances where a joint owner of property disclaims his survivorship interest in the property, shortly after the death of the other joint owner. The question to be answered is whether the disclaimer must occur within (1) reasonable proximity to the creation of the joint tenancy or (2) reasonable proximity to the death of the deceased joint owner in order to be timely and thus escape the imposition of Federal gift

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[7] All joint tenancy property was acquired prior to 1976. Parcels four and six were acquired by petitioner in 1941 and 1943, respectively, and conveyed in 1947 to herself and decedent as joint tenants. The date of transfer of the other parcels of joint tenancy property was not stipulated to or made a part of the record. We assume that all such property was put into joint tenancy before 1955, because neither party has asserted the applicability of §2515, as in effect in the Internal Revenue Code of 1954 until its repeal by the Economic Recovery Tax Act of 1981.

tax. If the disclaimer is timely, the property is treated as having passed directly from the decedent to the other heirs. Under these circumstances the disclaiming individual, who is not considered the transferor of the disclaimed property, will not owe gift tax in connection with the said property. Rather, the decedent's estate will owe estate tax on the disclaimed portion of the property. Conversely, if the disclaimer is not timely, the disclaimant is considered the transferor of the property and the transfer from said disclaimant to the heirs will be subject to gift tax.[8] See §2501 and §2511.[9]

We have recently addressed this issue in a Memorandum Opinion, which was reversed by the Circuit Court of Appeals for the Seventh Circuit. *Kennedy v. Commissioner,* 804 F.2d 1332 (7th Cir. 1986).[10] Petitioners ask us to follow the Seventh Circuit's opinion in *Kennedy* and respondent urges that we follow

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[8] Accordingly, where property is jointly owned by two people, and a timely disclaimer is not made, Federal gift tax will be imposed on 50 percent (the portion being disclaimed) of the fair market value of the property.

[9] §2501 provides the general rule that a tax is imposed on transfers of property by gift. §2511 provides that the tax shall apply whether the transfer is "in trust or otherwise" and whether the gift is "direct or indirect."

[10] For convenience, when discussing the facts, we will simply refer to "*Kennedy*" when discussing the Circuit Court's opinion or our Memorandum Opinion.

the reasoning set forth in our Memorandum Opinion.[11] After careful consideration, we disagree with the Seventh Circuit's holding and instead follow the holding and rationale set forth in our Memorandum Opinion, which is more in line with the Supreme Court's reasoning in *Jewett v. Commissioner,* 455 U.S. 305 (1982).[12]

The facts in *Kennedy* and in the case at hand are substantially similar. *Kennedy* involved Pearl Kennedy's (Pearl) disclaimer of her survivorship interest in joint tenancy property within 9 months of her late husband Frank's (Frank) death. Pearl and Frank acquired the property in 1953; Frank furnished all of the consideration for the purchase. No taxable gift was reported in connection with the creation of the joint tenancy.

Frank died testate in 1978, and Pearl disclaimed an undivided one-half interest in the property about 9 months later. The disclaimer was effective under Illinois law to vest the disclaimed interest in Pearl's daughter Marsha, who recevied it pursuant to the terms of Frank's will. The value of the property was included in Frank's estate and reported on his estate's Federal estate tax return.

The critical issue in *Kennedy* (and in the instant case) is which event began the period for teting whether the disclaimer was timely: the creation of the joint tenancy or the death of the joint tenant. In the *Kennedy* Memorandum Opinion, we concluded that the event which began the period for testing the timeliness of the disclaimer of the undivided one-half interest in the property was the creation of the joint tenancy. Accordingly, we

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[11] A proper appeal in this case would lie in the Eighth Circuit not the Seventh Circuit. Accordingly, we are not bound by the Seventh Circuit's opinion in *Kennedy v. Commissioner,* 804 F.2d 1332 (7th Cir. 1986). See *Golsen v. Commissioner,* 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971), cert. denied 404 U.S. 940 (1971).

[12] For convenience, we will refer to this case as "*Jewett.*"

found that Pearl's disclaimer, executed many years after the creation of the joint tenancy, was not executed within a reasonable time, within the meaning of §25.2511-1(c), Gift Tax Regs., and therefore her disclaimer effected a transfer of an interest in property subject to Federal gift tax. In so concluding, we relied on *Jewett v. Commissioner,* 455 U.S. 305 (1982).

Jewett involved a testamentary trust and four generations of Jewetts. The taxpayer (disclaimant) was in the third generation. Under the terms of the trust, the taxpayer would receive 1 share of the trust corpus, if he survived his mother; if he predeceased her, that share would be distributed to his issue. The trust was created in 1939; the taxpayer disclaimed his interest in 1972.

Respondent determined that the two disclaimers executed were indirect transfers of property by gift within the meaning of §§2501(a)(1) and 2511(a),[13] and that they were not within the exception of §25.2511-1(c), Gift Tax Regs.[14] The controversy involved whether the word "transfer" refers to the time of crea-

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[13] See note 9 *supra.*

[14] Gift Tax Regs. §25.2511-1(c) provides in pertinent part:

"The gift tax also applies to gifts indirectly made. Thus, all transacitons whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further §25.2512-8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer."

tion of the remainder interest[15] (by the taxpayer's grandmother's will) or to the vesting or distribution of that interest to the taxpayer or his issue. The Supreme Court, in analyzing the regulations, focused on (1) the lack of reference to future interests or remainders and the references to testamentary transfers, and (2) the requirement therein that the recipient know of the "transfer," noting that the second point seems superfluous if the relevant point for testing the timeliness of a disclaimer is at the distribution of the assets. The Supreme Court concluded that for purposes of Gift Tax Regulations §25.2511-1(c), the "transfer" took place at the testator's death, the time the interest was created. Accordingly, the Supreme Court found that the disclaimers made 33 years after the creation of the interest and 24 years after the taxpayer reached the age of majority were not made within a reasonable time.[16]

In *Kennedy,* the Circuit Court attempted to factually distinguish *Jewett* by focusing on a joint tenant's ability to partition under Illinois State law. The Circuit Court noted that under Illinois law, partition caused by either spouse or by divorce would have ended the right of survivorship. The Court equated this power to partition with a general power of appointment, because Frank's exercise of either could result in the use of the property by or transfer of the property to his creditors or legatees, rather than Pearl. Considering *Jewett* distinguished,

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[15] In *Jewett,* both this Court and the Supreme Court assumed the taxpayer's interest to be a contingent remainder. The Supreme Court noted that the taxpayer's interest instead may be characterized as a vested remainder subject to divestment, but did not find the distinction one of substance for purposes therein. *Jewett v. Commissioner,* 455 U.S. 305, 309 n. 5 (1982).

[16] See also *Poinier v. Commissioner,* 86 T.C. 478 (1986), where we relied on *Jewett,* and concluded that a disclaimer of a remainder interest executed 5 days after the death of the life tenant and some 33 years after creation of the interest was not made within a reasonable time as required under §25.2511-1(c), Gift Tax Regs.

the Circuit Court went on to conclude that in States such as Illinois, that allow any tenant to partition the property at will:

> the gift of a joint tenancy with right of survivorship should be treated as more than one transfer * * *. One transfer is an undivided interest, given on the date the tenancy is created. Additional transfers occur on the death of other joint tenants. * * * [*Kennedy v. Commissioner, supra* at 1336.]

Based upon this reasoning, the Circuit Court reversed our Memorandum Opinion and remanded the case to this Court to determine whether Pearl made a "qualified disclaimer" under §2518 and the regulations thereunder.

Upon reconsideration of this issue, we are not persuaded that our analysis in the Memorandum Opinion is incorrect. Under North Dakota law, a joint tenant's interest, including the right of survivorship, stems from the original conveyance, the original joint tenancy deed. *Jamestown Terminal Elevator, Inc. v. Knopp,* 246 N.W.2d 612, 613 (N.D. 1976) (The right of survivorship is in the whole interest conveyed by the original joint tenancy deed, not merely in the deceased joint tenants' moiety.); see *Schlichenmayer v. Luithle,* 221 N.W.2d 77, 83 (N.D. 1974), and *In re Kaspari's Estate,* 71 N.W.2d 558, 564 (N.D. 1955); see also *Harms v. Sprague,* 105 Ill. 2d 215, 473 N.E.2d 930 (1984).[17] We do not view the fact that joint tenancy interests may be severed by partition, alienation, or sale under execution upon a judgment lien, inter alia, under North Dakota law as a persuasive basis on which to distinguish *Jewett.* First, under these facts, the right and interest of a surviving joint tenant was fixed and undisturbed from the creation of the tenan-

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[17] The North Dakota Century Code defines a joint tenancy interest, in pertinent part as: "one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy." N.D. Cent. Code §47-02-06 (1978).

cies through the death of decedent. Under North Dakota law, sole ownership of the fee is contingent upon the survival of one of the joint tenants. "The surviving joint tenant does not take the interest of the deceased joint tenant; rather, the contingent remainder vests in the survivor because the contingency (survival of the cotenant) has been met."[18] *Jamestown Terminal Elevator, Inc. v. Knopp, supra* at 614. As we stated in *Kennedy,* "This feature is a contingency that is not * * * materially different than the contingency faced by the disclaiming taxpayer in *Jewett.*" *Kennedy v. Commissioner,* 51 T.C.M. 232, 233, 55 P-H Memo T.C. par. 86,003, at 86-9 (1986), revd. 804 F.2d 1332 (7th Cir. 1986). Second, North Dakota law, although permitting partition or severance of joint tenancies, only permits it in limited circumstances and certainly not at the whim of a joint tenant. See *Jamestown Terminal Elevator, Inc. v. Knopp, supra; Renz v. Renz,* 256 N.W.2d 883, 885 (N.D. 1977).

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[18] We recognize that under North Dakota law, joint tenancy is a creature of statute. See note 17 *supra;* see also *Renz v. Renz,* 256 N.W.2d 883 (N.D. 1977). However, we do not view a surviving joint tenant's right to disclaim under North Dakota law "as a separate interest in any property or interest therein devolving to him by right of survivorship," as determinative of whether the surviving joint tenant's interest in the right of survivorship stemmed from the creation of the deed or as creating a "transfer" for Federal gift tax purposes. See N.D. Cent. Code §47-11.1-01 (1978). Contra *Ferguson v. United States,* an unreported case (D. Ariz. 1981, 48 AFTR2d 81-6252, 81-1 USTC par. 13,409); *Hoffman v. United States,* an unreported case (D. Neb. 1984, 56 AFTR2d 85-6553, 85-2 USTC par. 13,630). Nor do we find a person's ability to timely disclaim a "future interest" within 6 months of that interest's becoming "indefeasibly vested" under North Dakota law as determinative. See N.D. Cent. Code §47-11.1-02 (1978). The issue of whether petitioner's disclaimer was executed within a "reasonable time * * * of the transfer to him" is an issue of Federal law not controlled by State law. See *Jewett v. Commissioner,* 70 T.C. 430, 433 (1978), affd. 638 F.2d 93 (9th Cir. 1980), affd. 455 U.S. 305 (1982). "While a State court might be willing to accept a renunciation of a nonpossessory and not indefeasibly vested property interest after the passage of considerable time, so long as the interests of third parties have not been harmed, the passage of time is crucial to the scheme of the gift tax." *Jewett v. Commissioner, supra* at 437.

It is an established common law principle that:

> "The interest of two joint tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate and distinct, the joint tenancy instantly ceases. But, while it continues, each of two joint tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole *remains* to the survivor." [*Jamestown Terminal Elevator, Inc. v. Knopp, supra* at 613-614, citing 2 W. Blackstone, Commentaries 184-185. Emphasis added.]

We, therefore, find that petitioner's interests in the various properties at issue were created by taxable transfers[19] before 1976[20] and, accordingly, any disclaimer of such interests is governed by §2511 and the regulations thereunder. Gift Tax Regulaitons §25.2511-1(c), as pertinent herein, provides that a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the

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[19] This case was submitted fully stipulated, and generally petitioner has not provided the dates of the creation of the joint tenancies. Furthermore, the parties have limited their briefs as to when the "transfer" occurred. Accordingly, we assume that §2515, as in effect in the Internal Revenue Code of 1954 until its repeal by the Economic Recovery Tax Act of 1981, is not applicable, and that the joint tenancies were created by taxable transfers. (See note 7 *supra*.)

[20] Because of this holding, it is not necessary to consider the relevance, if any, to be given to the fact that petitioner originally acquired title to the two parcels in her own name. Cf. Rev. Rul. 83-85, 1983-1 C.B. 745.

existence of the transfer.[21] We conclude that, under these circumstances, the transfer of the joint property interest occurred at the creation of the joint tenancy and that petitioner's 1981 disclaimer was not made within a reasonable time.

Special Use Valuation

§2032A permits, for estate tax purposes, special use valuation of real property on the basis of actual use (farming) rather than at the traditional fair market value, which may exceed the value when the property is used for farming. Special use valuation is available to an estate, only if it meets specific requirements.[22]

Respondent contends that the estate tax return did not contain a valid election because three of the four "qualified heirs" did not sign the statement of election or recapture statement, and that the return likewise did not "substantially comply" or provide "substantially all" of the required information. Petitioner contends: (1) That a proper §2032A election was made on the estate tax return "substantially complie[d]" or provided "substantially all" of the required information; and (3) that the amended return corrected any deficiencies in the original return. Respondent counters that the amended return could not correct the original return. We agree with respondent on both points.

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[21] See note 14 *supra*. Gift Tax Reg. §25.2511-1(c) has been amended by T.D. 8905, 1986-35 I.R.B. 6, but the changes do not affect the outcome in this case.

Gift Tax Regulation §25.2511-(1)(c) also requires that: (1) The law governing the administration of the decedent's estate gives a beneficiary, heir or next-of-kin a right completely and unqualifiedly to refuse to accept ownership. (2) The refusal must be unequivocal and effective under the local law. (3) There can be no refusal of ownership of property after its acceptance. These additional requirements are not at issue in this case.

[22] See §2032A(b); *Estate of Clinard v. Commissioner*, 86 T.C. 1180 (1986); *Estate of Davis v. Commissioner*, 86 T.C. 1156 (1986).

In deciding this issue, we will first determine whether the §2032A election on the original estate tax return was sufficient to qualify the estate for the benefits of §2032A, and if not, whether the insufficiency was cured by means of the amended estate tax return.

§2032A(d) requires that the estate must make an election "[no] later than the time prescribed by §6075(a) for filing the return of tax imposed by §2001 (including extensions thereof), and * * * in such manner as the Secretary shall by regulations prescribe."[23]

Estate Tax Regulations §20.2032A-8(a)(3) states that:

> An election under this section is made by attaching to a timely filed estate tax return the agreement described in paragraph (c)(1) of this section and a notice of election which contains the following information:
>
> * * * * * * * *
>
> (xii) The name, address, taxpayer identification number, and relationship to the decendent of each person taking an interest in each item of specially valued property, and the value of the property interests passing to each such person based on both fair market value and qualified use;
>
> * * * * * * * *
>
> If neither an election nor a protective election is timely made, special use valuation is not available to the estate. See §§2032A(d)(1), 6075(a), and 6081(a).[24]

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[23] In 1981, Congress amended §2032A(d)(1) to allow the election to be made on the first estate tax return, regardless whether the return is timely filed. This amendment is expressly made applicable to estates of decedents who died after Dec. 31, 1981, however, and as such does not apply herein. See Economic Recovery Tax Act of 1981, Pub. L. 97-34, §§421(j)(3) and 421(k)(l), 95 Stat. 313.

[24] Petitioner does not argue that a "protective election" was made.

Estate Tax Regulation §20.2032A-8(c)(1) further provides that: "The agreement required under §2032A(a)(1)(B) and (d)(2) must be executed by all parties who have any interest in the property being valued based on its qualified use as of the date of the decedent's death." Estate Tax Regulations §20.2032A-8(c)(2) states that "An interest in property is an interest which, as of the date of the decedent's death, can be asserted under applicable local law so as to affect the disposition of the specially valued property by the estate."

The estate first contends that petitioner was the sole individual with an interest in the property on the date of decedent's death, and accordingly, the only person required to sign the §2032A election statement and recapture agreement. The estate generally accepts applicability of the "relation back" doctrine applied to renunciations under North Dakota law, which would treat the person who renounced as though she had predeceased the testator. See N.D. Cent. Code §47-11.1-01 and §47-11.1-04 (1978). However, the estate argues that the "judicial fiction of the doctrine of relation back of a disclaimer is simply out of place," when dealing with a "federal statute which specifically requires reference to 'as of the date of the decedent's death,' with regulations that echo that requirement and where both that statute and the regulations have been followed to the letter." The estate further argues that it followed the state and regulations which do not contemplate disclaimers. Alternatively, the estate contends, that it should be afforded §2032A special use valuation because it substantially complied with the election provisions or provided substantially all of the information required, and amended the return to include all of the necessary information.

Respondent, on the other hand, maintains that the initial §2032A election was not sufficient to meet the requirements of §2032A(a)(1)(B) and (d)(2) as interpreted by Estate Tax Regulations §20.2032A-8(c) because it did not contain "the signatures of three of the four qualified heirs to the property for which

special use valuation was requested." Furthermore, respondent contends that the amended return did not serve to remedy the incomplete election on the estate tax return.

Neither party has provided any cases on point. Respondent references a number of cases where we have found §2032A elections to be insufficient, where no election was attempted on a timely original estate tax return and an amended return was filed (after the due date of the original return, including extensions) containing a §2032A election statement.[25] Respondent has also advanced a number of cases which stand for the general proposition that taxpayers must strictly comply with §2032A in order to receive the statutory relief.[26] We view the amended return cases cited by respondent as not determinative but analogous, because the fact patterns are, to some extent, similar.

In the case at hand, the estate timely filed an estate tax return, and attached to that return a §2032A election along with a recapture agreement, both signed by petitioner and Cornelius. The estate did not provide the additional information on the amended return within the period permitted by the statute and regulations. See §2032A(d). In considering whether the original return contained a proper §2032A special use valuation election, we must determine whether the election statement and recapture agreement contained the necessary signatures. Both documents were signed by petitioner and Cornelius. Because at the time of

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[25] E.g., *Carmean v. United States*, an unreported case (4 Cl. Ct. 181 (1983)); *Estate of Boyd v. Commissioner*, T.C. Memo. 1983-316; *Estate of Young v. Commissioner*, T.C. Memo. 1983-686; *Teubert v. United States*, an unreported case (D. Minn. 1983, 51 AFTR2d 1340, 83-1 USTC par. 13,513).

[26] E.g., *Estate of Cowser v. Commissioner*, 736 F.2d 1168 (7th Cir. 1984), affg. 80 T.C. 783 (1983); *Estate of Abell v. Commissioner*, 83 T.C. 696 (1984); *Estate of Coon v. Commissioner*, 81 T.C. 602 (1983); *Estate of Geiger v. Commissioner*, 80 T.C. 484 (1983).

filing the estate tax return, petitioner had renounced her interest in the properties at issue,[27] it was clear that under North Dakota law, petitioner no longer possessed any interest in the property.[28] Under local law, petitioner was treated as though she predeceased the decedent, and the property devolved to the other heirs. See Estate Tax Reg. §20.2032-8(c)(2),[29] N.D. Cent. Code §47-11.1-03 (1978). The requirement that persons with an interest in the property sign both the §2032A election statement and the recapture agreement is an essential element of the special use valuation provision. Without these signatures, it isnot clear that the ultimate recipients of the §2032A special use

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[27] We note that the renunciation was dated Sept. 23, 1981, approximately 2 weeks before the original estate tax return was filed Oct. 7, 1981.

[28] Curiously, neither petitioner in filing the estate tax return, nor respondent in auditing it, took the position that the disclaimer otherwise affected the estate tax. The estate claimed and respondent permitted the marital deduction to the full extent provided by law, without regard to the disclaimer, even though a large part of the marital deduction was attributable to jointly held property.

[29] Of course, in this instance, local law is determinative of ownership and Federal law dictates the tax consequences. However, we note that the tax consequences do not change the realities of ownership and use for other purposes. See *Riggs v. Del Drago,* 317 U.S. 95, 98-101 (1942).

valuation benefit would be subject to recapture.[30] We therefore conclude that the attempted §2032A election on the original estate tax return did not meet the statutory and regulatory requirements.[31]

The estate argues, in the alternative, that even though the original timely filed estate tax return did not include all of the required information for a proper §2032A election, that the original return "substantially complie[d]" or included "substantially all" of the required information within the meaning of §2032A as amended. The estate contends that it is entitled to §2032A valuation because it later provided an amended return containing the signatures of the "qualified heirs." Again, we disagree. An amended return outside of the time limitation will not serve to retroactively cure the insuffi-

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[30] The Joint Committee explains that filing a written agreement evidencing the consent of each party (who has an interest in the property) to the application of the recapture tax provisions (which amount to a consent to be personally liable for any recapture tax imposed), is a requirement for making a valid election, and further notes: "The Congress believed that each person receiving an interest subject to potential recapture should agree to this potential liability, especially since that person may not have received the tax benefits from the special use valuation (because, for example, the estate tax burden is borne by a residuary legatee who did not receive farm property)." Staff of Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1976, 1976-3 C.B. (Vol. 2) 548, 555. We also recognize that §2032A(c)(6) separately provides the general rule that "the qualified heir shall be personally liable for the additional tax imposed" (with respect to the qualified heir's interest in the property) without reference to the recapture agreement itself.

[31] As previously noted, without the heirs' signatures, the election on the original return may not effectively bind the heirs. Compare *Atlantic Veneer Corp. v. Commissioner,* 85 T.C. 1075 (1985), affd. 812 F.2d 158 (4th Cir. 1987); *DeMarco v. Commissioner,* 87 T.C. 518 (1986), on appeal (1st Cir., Jan. 15, 1987); *Tipps v. Commissioner,* 74 T.C. 458, 468 (1980); *Valdes v. Commissioner,* 60 T.C. 810, 915 (1973).

ciencies of the original return. We recently decided an analogous situation where necessary information was untimely submitted and found insufficient to cure the original defect. *Estate of Gunland v. Commissioner,* 88 T.C. 1453 (1987).

For purposes relevant herein, §2032A has been amended twice: (1) §2032(A)(d)(3), as added by the Deficit Reduction Act of 1984, provides, in pertinent part, that for estates of decedents dying after December 31, 1976, the executor will have a reasonable period of time (not exceeding 90 days) within which to provide additional information if the election substantially complies with the regulations; and (2) §1421 of the Tax Reform Act of 1986 provides that if the executor made a §2032A election and provided substantially all the information with respect to such election, that the election will be valid if the executor provides the additional information within 90 days of receipt of respondent's request.[32] These two amendments were added to remedy perceived rigidity in the potential applicability of §2032A.

§2032A(d)(3), as added by the Deficit Reduction Act of 1984 (the 1984 amendment), provides:

> (3) MODIFICATION OF ELECTION AND AGREEMENT TO BE PERMITTED.— The Secretary shall prescribe procedures which provide that in any case in which—
>
> > (A) the executor makes an election under paragraph (1) within the time prescribed for filing such election, and

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[32] Tax Reform Act of 1986, Pub. L. 99-514, §1421, 100 Stat. 2717, as provided in subsec. (c), applies to all estates except those where before the date of enactment (Oct. 22, 1986) the statute of limitations has expired with respect to (1) the return of tax imposed by §2001, I.R.C. 1954, or (2) the period during which a claim for credit or refund may be timely filed.

(B) substantially complies with the regulations prescribed by the Secretary with respect to such election, but—

(i) the notice of election, as filed, does not contain all required information, or

(ii) signatures of 1 or more persons required to enter into the agreement described in paragraph (2) are not included on the agreement as filed, or the agreement does not contain all required information,

the executor will have a reasonable period of time (not exceeding 90 days) after notification of such failures to provide such information or agreements.

Reference to the Conference report regarding §2032A(d)(3) provides some assistance in determining whether an election "substantially complie[d]" with the regulations: "To be eligible for perfection, the agreement as originally filed must at a minimum be valid under state law and must include the signatures of all parties having a present interest or a remainder interest *other than an interest having a relatively small value.*" (H. Rept. 98-861 (Conf.) (1984), 1984-3 C.B. (Vol. 2) 495. Fn. ref. omitted; emphasis added.)

§1421 of the Tax Reform Act of 1986 (the 1986 amendment) provides, in pertinent part:

(a) IN GENERAL.—In the case of any decedent dying before January 1, 1986, if the executor—

(1) made an election under §2032A of the Internal Revenue Code of 1954 on the return of tax imposed by §2001 of such Code within the time prescribed for filing such return (including extensions thereof), and

(2) provided substantially all the information with respect to such election required on such return of

tax, such election shall be a valid election for purposes of §2032A of such Code.

(2) EXECUTOR MUST PROVIDE INFORMATION.—An election described in subsection (a) shall not be valid if the Secretary of the Treasury or his delegate after the date of the enactment of this Act requests information from the executor with respect to such election and the executor does not provide such information with 90 days of recept of such request.

The Conference report concerning §1421 of the Tax Reform Act of 1986, indicates that the amendment was enacted specifically to compensate for incomplete instructions in one version of the estate tax return (Form 706). H. Rept. 99-841 (Conf.) at II-770 (1986) (to accompany H.R. 3838), 1986-3 C.B. (Vol. 4) 770-771.

We must determine whether a §2032A election on a timely filed estate tax return that fails to include at least three qualified heirs "substantially complies" or includes "substantially all" of the required information within the meaning of the above amendments.

Unfortunately, it appears that the Estate's factual situation falls far outside of either amendment's ambit. The 1984 amendment provides that a return that does not include all of the necessary signatures may still substantially comply with the election provision, and thus be modified to include all necessary information, but the Conference report indicates that the intended missing signatures were those of persons with relatively small interests in the property. The 1986 amendment was enacted specifically to allow for incomplete instructions on one version of the estate tax return, which version was not used in the case at hand.

The attempted election on the original return lacked most of the necessary signatures of the persons with interests in the pro-

perty. The timely filing of a proper election, including the signatures on a recapture agreement, is an essential requirement for a §2032A election.[33] See *Estate of Gunland v. Commissioner,* 88 T.C. 1453 (1987). Because of the limited nature of the above quoted amendments as explained by the Conference reports, we are compelled to conclude that the §2032A election on the original estate tax return was insufficient to permit perfection under either statutory amendment. Accordingly, we conclude that the estate is not entitled to §2032A special use valuation.

Decisions will be entered for the respondent.

Reviewed by the Court.

STERRETT, CHABOT, WHITAKER, KORNER, HAMBLEN, COHEN, SWIFT, WRIGHT, and WILLIAMS, *JJ.*, agree with the majority opinion.

NIMS, *J.*, dissenting: I respectfully dissent from the majority's holding on the disclaimer issue. The majority attempts to apply *Jewett v. Commissioner,* 455 U.S. 305 (1982), but on facts parallel to those in our case, the Seventh Circuit has pointed out the defect in our analysis. *Kennedy v. Commissioner,* 804 F.2d 1332 (7th Cir. 1986), revg. and remanding T.C. Memo. 1986-3. The Circuit Court said:

> *Jewett* shows that a belated disclaimer may be a taxable gift even though the person disclaiming has no current access to the money and may never receive it. The IRS

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[33] We have also found an attempted §2032A election made on an estate tax return filed late to be insufficient, regardless of whether the late filing was due to reasonable cause. *Estate of Boyd v. Commissioner,* T.C. Memo. 1983-316.

> believes that this compels a conclusion that Pearl Kennedy had only a "reasonable" time after 1953 to disclaim and to have the transaction treated as a gift from Frank Kennedy to their daughter. The problem with this position is that the interests of the different generations of Jewetts were fixed in 1939. One could get out the actuarial tables in 1939 or 1972 and determine how much each person's share was worth. Frank's gift to Pearl in 1953 did not fix the rules for succession, however, because of the right to partition the property. [804 F.2d at 1334.]

In other words, the Jewett interests become *irrevocable* with the creation of the trust at Mrs. Jewett's death, whereas Frank Kennedy's gift to Pearl, i.e., the right of Pearl to receive Frank's interest when Frank died, was *revocable* until Frank's death, when it became *irrevocable.*[1] Under §2518(b)(2)(A), taxpayer then had 9 months within which to disclaim, which she did.

It is not perfectly clear from the majority opinion to what extent the McDonald joint interests created under North Dakota law parallel the Illinois joint interests in *Kennedy*. Nevertheless, the majority concedes that North Dakota law permits partition or severance of joint tenancies under some conditions. In this connection, it may be stated as a general proposition that in most common law jurisdictions, at least, a joint tenancy in real estate is entirely distinguishable from a tenancy by the entirety between husband and wife with right of survivorship. In the lat-

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[1] See *United States v. Jacobs,* 306 U.S. 363, 371 (1939):

> "Until the death of her co-tenant, the wife could have severed the joint enancy and thus have escaped the application of the estate tax of which she complains. Upon the death of her co-tenant she for the first time became possessed of the sole right to sell the entire property without risk of loss which might have resulted from partition or separate sale of her interest while decedent lived. * * *"

ter case, there is no power of severance based, no doubt, upon the "amiable fiction" of common law that husband and wife are one person. See *United States v. Jacobs,* 306 U.S. 363, 369 (1939).

It may also be noted that the timing in the case before us is worlds apart from that in *Jewett.* In *Jewett,* the various interests were fixed in 1939 when Mrs. Jewett died, but George, the disclaimant, then waited 33 years to disclaim. Here, petitioner promptly disclaimed within the 9-month period following her husband's death, as permitted by §2518(b)(2)(A). The decedent's interest was, of course, found in the gross estate for estate tax purposes, and a tax-defective disclaimer by petitioner would have attracted an additional and immediate gift tax.

It is exactly this kind of result which I believe Congress intended to mitigate when it adopted §2518 in 1976. See SH. Rept. 94-1380, 1976-3 C.B. (Vol. 3) 738, 800-801. I can perceive of no policy reason for discriminating against disclaimers of joint interests includable in the gross estate vis-a-vis other types of interests, e.g., tenancies-in-common, general powers of appointment, etc. I would therefore hold for petitioners.

CLAPP, JACOBS, and WELLS, *JJ.*, agree with this dissent.

PARR, *J.*, dissenting: I agree with the dissent by Judge Nims, except for his discussion of tenancies by the entirety.

First, we are not required to reach this issue, since estates by the entirety have never been separately recognized in North Dakota. *Renz v. Renz,* 256 N.W.2d 883, 884-885 (N.D. 1977); cf. N.D. Cent. Code §47-02-06 (1986 rev.) (defining joint interests to include co-ownership with survivorship rights).

Second, a divorce or annulment generally terminates the tenancy by the entirety and transforms it into a tenancy-in-

common, with each spouse holding an undivided one-half interest. 4A R. Powell, Law of Real Property, par. 624[3] (1986). Since a tenancy by the entirety is therefore revocable by the parties, I disagree with Judge Nims' distinction on these grounds between tenancies by the entirety and joint tenancies, and would apply the same rules to both forms of ownership.

PARKER, *J.*, agrees with this dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2389

Appeal from the United States Tax Court.

Gladys McDonald,
Appellant,

v.

Commissioner of Internal Revenue,
Appellee.

Appellant's petition for rehearing has been considered by the Court and is denied.

September 15, 1988

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
MAR 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1160

In the Supreme Court of the United States

OCTOBER TERM, 1988

C.F. CORNELIUS, PERSONAL REPRESENTATIVE, ESTATE OF JOHN MCDONALD, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an attempted election of special use valuation of farm property under Section 2032A of the Internal Revenue Code (26 U.S.C.) is eligible to be perfected belatedly if the election was invalid because the materials submitted with the initial estate tax return failed to identify all three heirs with present interests in the property and to furnish their consent to the election.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

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C.F. CORNELIUS, PERSONAL REPRESENTATIVE,
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COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A18) is reported at 853 F.2d 1494. The opinion of the Tax Court (Pet. App. A19-A42) is reported at 89 T.C. 293.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1988. A petition for rehearing was denied on September 15, 1988 (Pet. App. A43). The petition for a writ of certiorari was filed on December 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. John McDonald (decedent), a resident of North Dakota, died testate on January 16, 1981. He was survived by his widow, Gladys, four children, and three grandchildren. Except for some small specific bequests, the will provided that Gladys was to inherit all of decedent's property, if she survived him. On September 23, 1981, Gladys disclaimed her interest in the farmland she stood to inherit under the terms of decedent's will. As a result of this disclaimer, the property passed to three of decedent's children, Virlyn McDonald, Dorothy Spicer and Gladys Jean Cox, in equal shares. Pet. App. A5.

The federal estate tax return for decedent's estate was timely filed with the Internal Revenue Service on October 7, 1981. The farmland was "qualified real property" under Section 2032A(b) of the Internal Revenue Code,[1] and therefore eligible for special use valuation if the estate so elected.[2] Included in this return was a "Notice of Election

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2] Section 2032A of the Code provides a limited exception to the general rule that property is valued for estate tax purposes at its fair market value on the date of the decedent's death. If the estate elects Section 2032A treatment and certain conditions are met, which indicate that the property will continue to be used by the family for a "qualified use" (*i.e.*, as a family farm or business (I.R.C. § 2032A(b)(2)) for a specified number of years, the estate is permitted to value qualified real estate at its value for the qualified use, rather than its fair market value. The purpose of Section 2032A is to grant relief to the heirs of family farms who might otherwise find that valuation of inherited farmland at its highest and best use, such as for real estate development, would produce such a large estate tax liability that it would be necessary to liquidate the land in order to pay the tax. See H.R. Rep. No. 1380, 94th Cong., 2d Sess. 21-22 (1976). If, however, the property ceases to be used by the family for a qualified use during

of Special Use Valuation As Authorized by Section 2032A" and an "Agreement Relating to Special Use Valuation Under Section 2032A Of The 1976 Tax Reform Act." Both documents were signed by Gladys McDonald and by C.F. Cornelius, the personal representative of the estate, and they listed Gladys as the only person with an interest in the farmland on which special use valuation was elected. Pet. App. A5-A6.

On February 26, 1982, an amended federal estate tax return was filed. The amended return contained an amended "Agreement Relating To Special Use Valuation Under Section 2032A Of The 1976 Tax Reform Act," signed by Virlyn McDonald, Dorothy Spicer, Gladys Jean Cox, and three of decedent's grandchildren. On audit, the Commissioner determined that the estate did not qualify for the benefits of Section 2032A because the election documents filed with the initial estate tax return were not in substantial compliance with the requirements set forth in the applicable Treasury Regulations, and therefore the election could not be perfected belatedly by the amended agreement. Pet. App. A5-A6.

2. Petitioner sought redetermination of the asserted deficiency in the Tax Court, which, in a reviewed opinion, unanimously held that the estate did not qualify for special use valuation of farm property under Section 2032A (Pet. App. A30-A39).[3] The court found that the initial election

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the specified period, the IRS is entitled to "recapture" the estate tax that had been saved by means of the special use election. See I.R.C. § 2032A(c)(1)(B).

[3] In a separate gift tax deficiency notice addressed to Gladys, the Commissioner took the position that her disclaimer of her interest in certain property that she had held as a joint tenant with decedent was untimely under Section 25.2511-1(c) of the Gift Tax Regulations (26 C.F.R.). Her petition for redetermination of the resulting deficiency

was invalid (*id.* at A33-A35) because it did not contain the signature of the heirs, which is an "essential element of the special use valuation provision" (*id.* at A34). The court then noted that, under Section 2032A(d)(3), a defective election can be perfected later only where the election documents initially filed were in substantial compliance with the requirements of the Treasury Regulations (Pet. App. A36-A37). The court further found that the special provision for curing a defective election under Section 1421 of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2717, is limited to cases in which the initial filings provide substantially all the information required by the estate tax return, and that the provision had been enacted specifically to alleviate unfairness caused by incomplete instructions in one version of the estate tax return (Form 706) (Pet. App. A37-A38). Since the materials filed with the estate tax return in this case failed to identify three of the qualified heirs or to secure their consent to the election, the court determined that "the Estate's factual situation falls far outside of either amendment's ambit" (*id.* at A38). It concluded that the initial election attempt was not in substantial compliance with the requirements set forth in the Treasury Regulations or on the estate tax return and therefore could not be perfected later (*id.* at A38-A39).

3. The court of appeals affirmed (Pet. App. A6-A13). Since the disclaimed property was treated under North Dakota law as having passed directly to the three children as if Gladys had predeceased the decedent, the court rejected petitioner's threshold argument that her consent alone satisfied the regulatory requirements (*id.* at A8). The

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was consolidated with this case below. The Tax Court upheld the gift tax deficiency (Pet. App. A22-A30), but the Eighth Circuit reversed (*id.* at A13-A18). No issue pertaining to that gift tax deficiency is presented here.

court of appeals also rejected petitioner's contention that the estate was eligible to perfect its election under Section 2032A(d)(3) of the Code. The court noted that "[t]he statutory language, as a precondition to the addition of signatures, requires that the original election substantially comply with 26 C.F.R. Section 20.2032A-8, which includes the requirement that the original agreement be binding on all parties taking an interest in the property" (Pet. App. A10). "Based only on this language," the court continued, "it is difficult to conclude that the original election was in substantial compliance with this requirement when it contained neither the name nor the signature of anyone with an interest in the property as of the date of Decedent's death" (*ibid.*). The court noted that its conclusion was supported by the pertinent legislative history, which states in part that " '[t]o be eligible for perfection, the agreement as originally filed must at a minimum be valid under State law and must include the signatures of all parties having a present interest or a remainder interest other than an interest having a relatively small value' " (*id.* at A11, quoting H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. at 1241 (1984)). The court, relying on illustrations from the legislative history, concluded that Congress intended to permit perfection of an election only where the original election contained "slight technical failures" (*id.* at A12 & n.6). It held that "the omission from the recapture agreement of the signatures of all persons with an interest in the property is not the type of slight technicality envisioned by Congress * * *" (*id.* at A11-A12).

The court of appeals also rejected petitioner's argument that he was entitled to perfect the election under Section 1421 of the Tax Reform Act of 1986 (Pet. App. A13). Because petitioner did not contend that the return he used suggested different requirements from those specified in

the Treasury Regulations, the court concluded that the estate did not qualify for relief under this provision (*ibid.*).

ARGUMENT

The court of appeals correctly rejected petitioner's attempt to cure the estate's faulty election of special use valuation. The decision of the court of appeals does not conflict with any decision of this Court or of another court of appeals. Accordingly, review by this Court is not warranted.

1. Section 2032A confers a substantial tax benefit in permitting an estate to elect to value qualifying real estate for estate tax purposes based on its actual use, rather than its highest and best use. Congress established several conditions that must be satisfied in order to qualify for this favorable treatment. Of relevance here, Section 2032A and Treas. Reg. § 20.2032A-8(a)(3) (26 C.F.R.), specify the procedures that must be followed to make a valid election. They require the executor to file, as part of a timely estate tax return, a notice of election identifying, *inter alia*, all persons with interests in the specially valued property and an agreement expressing the consent of the heirs to be liable for the recapture of the special tax benefits in the event of a premature disposition of the property or cessation of its qualified use within a specified period.[4]

Secton 2032A(d)(3) permits a defective election to be perfected later, but by its terms it makes that opportunity available only where the initial election, although defective in minor respects, is already in "substantial compliance" with the requirements of the Treasury Regulations. The

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[4] This agreement, commonly known as a "recapture agreement," ensures that the IRS will be able to collect the tax that had been avoided through election of the special use valuation. See Section 2032A(c)(1)(B); *Martin* v. *Commissioner*, 783 F.2d 81 (7th Cir. 1986).

pertinent legislative history states that "[b]oth a notice of election and an agreement that themselves evidence substantial compliance with the requirements of the regulations must be included with the estate tax return, as filed, if the estate is to be permitted to perfect its election." H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1240-1241 (1984). To be valid under the regulations, a recapture agreement must be in a form that is binding under local law and must be executed by all parties with interests in the property as of the decedent's death. The heirs must expressly consent to personal liability for the recapture of the special benefits in the event of a premature disposition of the property or cessation of its qualified use. See Treas. Reg. § 20.2032A-8(c). These requirements implement the congressional intent reflected in the legislative history of the substantial compliance provision (H.R. Conf. Rep. No. 861, *supra,* at 1241): "To be eligible for perfection, the agreement as originally filed must at a minimum be valid under State law and must include the signatures of all parties having a present interest or a remainder interest other than an interest having a relatively small value."

2. Under this statutory framework, it is clear that the courts below correctly determined that the estate was not eligible to perfect its election. By the time the estate filed its tax return, Gladys had disclaimed her interest in the farmland she stood to inherit under the will, and the property therefore passed to three of decedent's children. Accordingly, those children had a continuing interest in the land, giving them the authority to determine if the land would continue to be used for a qualified use, and they were liable for recapture of the estate tax savings if they took steps inconsistent with the special use valuation—such as transferring ownership of the property or putting it to a nonqualifying use within the period specified by Section 2032A. Moreover, under North Dakota

law, Gladys's renunciation of decedent's property related back to the date of his death, and the disclaimed property passed to the three children as if Gladys had predeceased the decedent. Thus, it was apparent at the time the estate tax return was filed that the children were persons having "an interest * * * in [the] property" (I.R.C. § 2032A(d)(2); see also Treas. Reg. § 20.2032A-8(c)(1)) who were required to take part in the election.

Petitioner, however, filed with the estate tax return a notice of election and recapture agreement identifying Gladys, who no longer had an interest in the subject property, as the sole heir; the three children were not identified as persons having an interest in the property to be specially valued, and they did not consent to the imposition of the recapture tax. This election was far from "substantially compl[ying]" (I.R.C. § 2032A(d)(3)(B)) with the provisions of the Treasury Regulations, which require the attachment of a recapture agreement signed by all persons with interests in the property and binding under local law. Rather, the omission of the three persons who stood to inherit the property went to the heart of the election's validity, and therefore the terms of the statute do not permit the estate's initial election to be perfected belatedly. There are compelling reasons for this insistence by Congress that the documents as initially filed meet the "substantial compliance" standard. As explained by the Staff of the Joint Committee on Taxation, "[u]nless some level of compliance with Treasury regulations were required, some persons might intentionally neglect to comply unless they were discovered on examination." Staff of Joint Committee on Taxation, *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984* 1123 (Joint Comm. Print 1984). The result reached here by the courts below also accords with the principle recognized in other contexts that, where a statute demands specific, contem-

poraneous, and incontrovertible evidence of a binding decision to accept the tax consequences imposed by an election, the failure to supply unequivocal proof of the required consent to the election goes to the essence of the election, precluding its subsequent perfection. See, *e.g.*, *Dunavant* v. *Commissioner,* 63 T.C. 316 (1974); *Valdes* v. *Commissioner,* 60 T.C. 910 (1973).

There is no merit to petitioner's contention (Pet. 8-9) that this Court should grant certiorari to rectify what he terms the "mis-use" (Pet. 8) of legislative history. First, as the court of appeals noted (Pet. App. A10), application of the statutory language alone, without resort to the legislative history, indicates that the estate cannot belatedly perfect an election that does not contain the names or signatures of any of the three people who stood to inherit the property. In any event, the court of appeals correctly concluded (*id.* at A11) that it is appropriate to look to the legislative history for guidance in interpreting the statutory term "substantial compliance." Petitioner advances no basis for his suggestion (Pet. 9) that the legislative history of Section 2032A(d) is inconsistent with the intent of Congress, and therefore the court of appeals correctly relied on the legislative history as a guide to interpreting the statute.

3. The court of appeals also correctly rejected petitioner's contention that the defective election could be perfected under Section 1421 of the Tax Reform Act of 1986, *supra.* By its terms, that statute limits relief to those instances where the executor has "provided substantially all the information with respect to such election required on such return of tax." The legislative history discloses that Congress added this provision because it was concerned that faulty instructions on one version of the estate tax return (Form 706) had induced taxpayers to fail to comply with the regulatory requirements for making the

election. Accordingly, the statute permits the late filing of recapture agreements by estates that had used a faulty version of Form 706, which did not specify that the agreement had to be submitted with the estate tax return, so long as the estate had substantially complied with the instructions stated on the return. S. Rep. No. 313, 99th Cong., 2d Sess. 876 (1986); H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. pt. 2, at 770-771 (1986).

This provision has no application here. The January 1979 version of Form 706 used here in fact specified that the heirs' consent to the recapture tax must be submitted with the return, and petitioner does not contend that the estate's failure to comply with the regulatory requirements had anything to do with any error in the instructions on the return. On the contrary, in failing to have the three persons with an interest in the property agree to the election, the estate did not "provide[ ] substantially all the information with respect to such election required on such return of tax," as required by Section 1421, and the 1986 Act provides no basis for a belated perfection of the election.[5]

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[5] Although there is no conflict in the circuits, petitioner suggests that certiorari is appropriate here because there are two other cases involving this issue that were appealed from district court decisions in favor of the estate. One of those cases has now been decided on appeal, with the court of appeals reversing and ruling in favor of the government in reliance on the decision below. *Foss* v. *United States,* No. 88-5152 (8th Cir. Jan. 9, 1989). The other case is still pending, *Prussner* v. *United States,* 87-2 U.S.T.C. (CCH) ¶ 13,739 (C.D. Ill. Oct. 13, 1987), appeal pending, No. 88-1933 (7th Cir.), but it is, in any event, distinguishable from the instant case. In *Prussner,* no recapture agreement was submitted with the return, but the estate's attorney explicitly alerted the IRS to that fact, explaining that he was having difficulty obtaining the signatures of heirs residing throughout the country. While we have argued in *Prussner* that the estate did not "substantially comply" with the regulatory requirements since no consent or recapture agreement was filed with the return, at least the IRS

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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was at all times on notice that the election was defective and that steps were being taken to perfect it. Here, by contrast, the IRS could discover only by examination that the election documents had been filed by the wrong person, and therefore that it did not have a recapture agreement from the persons actually liable for any recapture tax.

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No. 88-1160

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

C. F. CORNELIUS, PERSONAL REPRESENTATIVE,
ESTATE OF JOHN MCDONALD, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

REASONS FOR GRANTING THE PETITION

The initial (1984) provision granting relief from the strict manner in which the Internal Revenue Service had construed § 2032A, IRC became § 2032A(d)(3) which provides:

> (a) IN GENERAL. — § 2032A(d) (relating to election and agreement) is amended by adding at the end thereof the following new paragraph:
>
> "(3) MODIFICATION OF ELECTION AND AGREEMENT TO BE PERMITTED. — The Secretary shall prescribe procedures which provide that in any case in which—

"(A) the executor makes an election under paragraph (1) within the time prescribed for filing such election, and

"(B) *substantially complies with the regulations prescribed* by the Secretary with respect to such election, but—

"(i) the notice of election, as filed, does not contain all required information, or

"(ii) *signatures of 1 or more persons required to enter into the agreement described in paragraph (2) are not included on the agreement* as filed, or the agreement does not contain all required information. (Emphasis supplied)

Tax Reform Act of 1986, Pub. L. No. 99-514, § 1421(a)-(b), 100 Stat. 2085, 2716 (1986) (1986 Amendment).

In its brief (p. 8) the government contends that the estate did not "substantially comply" because the names and signatures of the three heirs who were to succeed to the farmland as a result of the disclaimer were not on the recapture agreement. The government adds (p. 8) that this omission is crucial by referring to yet additional legislative history from the Staff of the Joint Committee on Taxation's comment that "some persons might intentionally neglect to comply unless they were discovered on examination." We have three comments to this argument.

First, the attorney who prepared the estate tax return complied with the precise language of the regulations (Treas. Reg. § 20.2032A-8(c)) by obtaining the signature of the decedent's only heir at the time of his death (January 15, 1981). That attorney apparently did not understand the doctrine of "relation back" occasioned by the subsequently filed disclaimer. Our point here is merely to demonstrate the highly technical nature of the subject under review and that the error was inadvertent and caused by the complexity of the juxtaposition of the law governing

special use value and disclaimers. There were not then nor are there now any regulations governing those intertwined subjects.

Second, well before the estate tax return was examined by the Internal Revenue Service an amended estate tax return containing the signatures of the three children to a recapture agreement was filed. Hence there can be no possible loss to the government since it had the written guarantee that recaptured taxes would be repaid in the event the farmland did not continue to qualify during the recapture period. This fact demonstrates that there is little if any difference between this case and *Prussner v. United States,* 87-2 U.S.T.C. (CCH) Par. 13,739 (C.D. Ill. Oct. 13, 1987), appeal pending, No. 88-1933 (7th Cir.) despite the government's attempt to distinguish it (Br. ft. p. 10).

Third, the relief statute quoted above permits an estate to remedy a defective election if it "substantially complies with the regulations." § 2032(A)(3)(B), IRC. That same subsection provides that the remedy is allowable if "signatures of one or more persons required to enter into the agreement described in paragraph (2) are not included on the agreement as filed."

This estate failed to obtain "signatures of one or more person"; the statute says we can remedy the defect if the election otherwise "substantially complies." The Internal Revenue Service does not complain of any other failure other than identifying these three heirs by their signature. How then can the estate fail to "substantially comply" when its only mistake was to omit signatures which the relief statute permits it to add? Yet, by ignoring the clear mandate of the statute and resorting to legislative history the lower courts found that the curative provisions did not apply.

It is this reliance upon legislative history that qualifies this case as an appropriate decision for review before this Court. Particularly we and the tax bar are concerned about the existing practice, noted by the writer over the past fifteen to twenty years, of a clear Congressional announcement in the form of a

statute becoming almost unrecognizable when the gloss of legislative history is introduced.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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